90-42

No. _____

IN THE

Supreme Court of the United States

October Term, 1989

CLIFT C. LANE, INDIVIDUALLY, AND AS TRUSTEE UNDER THE CLIFT C. LANE REVOCABLE TRUST AND AS TRUSTEE UNDER THE DOROTHY P. LANE TRUST AND DOROTHY P. LANE, INDIVIDUALLY AND AS TRUSTEE UNDER THE DOROTHY P. LANE REVOCABLE TRUST AND AS TRUSTEE UNDER THE CLIFT C. LANE TRUST,

Petitioners

v.

WILLIAM B. SULLIVAN, INDIVIDUALLY, AND AS A PARTNER OF THE LAW PARTNERSHIP OF ARENT, FOX, KINTNER, PLOTKIN AND KAHN,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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TREVATHAN PRESS ▪ LITTLE ROCK

QUESTION PRESENTED

1. WHETHER COLLATERAL ESTOPPEL APPLIES WHEN THE PARTY AGAINST WHOM ESTOPPEL IS APPLIED HAD A SIGNIFICANTLY HIGHER BURDEN OF PROOF IN THE ACTION UPON WHICH ESTOPPEL IS BASED THAN IN THE PRESENT ACTION AND THE COURT IN THE FIRST ACTION RENDERED SPECIFIC FINDINGS OF FACT.

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REPORTS OF OPINIONS

The opinion of the District Court is not reported. The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 900 F.2d 1247 (8th Cir. 1990).

JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Eighth Circuit rendered and filed its opinion in this case on April 10, 1990. No Petition for Rehearing was filed.

This Court has jurisdiction to review the judgment below under the provisions of 28 U.S.C. §1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS

There are no constitutional or statutory provisions involved in this case.

STATEMENT OF THE CASE

On July 10, 1988, Petitioners sued Respondents in the United States District Court for the Western District of Arkansas, alleging that Respondents, who are attorneys, were negligent in representing them. Jurisdiction in the District Court was premised upon diversity of citizenship under 28 U.S.C. §1332.

Respondents owned all of the stock in nineteen companies involved in the poultry industry. Clift and Dorothy Lane started the business and, over the course of thirty years, built the business from a "mom and pop" beginning to a multi-million dollar operation with plants in several states.

In the early 1980s, the Lane companies experienced financial difficulties. The Respondent law firm had performed legal services for the Lanes on other matters, and in 1982, the firm filed bankruptcy for the Lanes individually and the Lane companies. In 1984, a plan of reorganization was proposed and approved by the bankruptcy court under Chapter 11 of the Bankruptcy Code. Under the Plan, most assets of the companies were consolidated with the Lanes' personal assets. However, the Lanes' stock was specifically excluded from the bankruptcy.

The Plan also called for the appointment of a three-member special panel which would provide consul-

tation and advice to the Lanes.

The Lanes' financial difficulties continued, and in the summer of 1985, they received several notices of default under the Plan. During the same period, Clift Lane was attempting to sell the companies. He received an offer from Lonnie Pilgram, owner of Pilgram's Pride, which he rejected because it was too low. Also during this period, Don Tyson of Tyson Foods expressed an interest in purchasing the Lane Companies to a member of the special panel. That expression of interest was not conveyed to the Lanes.

Respondent William Sullivan was the partner of the Respondent law firm with the primary responsibility for representing the Lanes. He was the primary author of the Plan. Under the terms of the Plan, the Lanes had between thirty and ninety days to cure a default, depending upon the nature of the default. If the Lanes could not cure the default, the special panel took over the operation of the companies as the board of directors.

In July 1985, Respondent Sullivan advised the Lanes that it would be in their best interest to turn over the companies to the special panel early. The special panel would have assumed control of the companies on August 2, 1985, if the Lanes did not cure the defaults.

On July 22, 1985, the Lanes signed their stock over to the special panel. Respondent Sullivan and other

members of his law firm prepared the transfer documents. Respondent Sullivan did not meet with the Lanes to explain the documents before execution. In fact, the Lanes did not see the documents before they were executed.

The only consideration the Lanes received for the transfer of the stock was consulting agreements under which each of them received $75,000.00 over two years. Immediately after the transfer, Respondent Sullivan began representing the special panel. Respondent Sullivan now claims that he did not represent the Lanes in the transfer, nor did he advise them that they needed representation.

About six months after the transfer, the special panel sold the stock to Tysons for $35,000,000.00. The Lanes received nothing from the proceeds of the sale.

The Lanes sued the special panel in the United States District Court for the Eastern District of Arkansas, alleging several equitable theories of recovery including express trust, implied trust, and reformation. The case was tried to the Honorable Oren Harris, who found against Petitioners on all counts. That decision was affirmed by the Eighth Circuit.

Petitioners then filed this suit. On the morning the trial was scheduled to begin, the District Court granted summary judgment to Respondents. The District

Court held that Petitioners are collaterally estopped from litigating issues decided adversely to them in the prior case, although Petitioners' burden in the prior case was "clear and convincing" while it was only a "preponderance" in this case.

Petitioners appealed the judgment of the District Court to the United States Court of Appeals for the Eighth Circuit. The Eighth Circuit acknowledged that collateral estoppel normally does not apply if the burden of proof in the case upon which estoppel is premised was significantly higher than the case in which estoppel is advanced as a defense, but nevertheless affirmed the District Court because particularized findings of fact were made in the first case.

ARGUMENT

Three circuit courts of appeals have considered the issue raised in this case. The Fifth Circuit *(Marlene Industries Corporation v. NLRB*, 712 F.2d 1011 [6th Cir. 1983]) and the Eighth Circuit both held that collateral estoppel applies despite the difference in the burden of proof. The Ninth Circuit, in *U.S. Aluminum Corp./Texas v. Alumax, Inc.*, 831 F.2d 878 (9th Cir. 1987), held that collateral estoppel does not apply.

No one disputes that the Petitioners' burden in the prior action was clear and convincing or that their burden in this case was a preponderance. No one disputes the general rule that collateral estoppel is inapplicable when the burden of proof in the first case is higher than in the second. See e.g., *United States v. One Assortment of 89 Firearms*, 465 U.S. 360 (1984); *One Lot Emerald Cut Stones v. United States*, 409 U.S. 232 (1972); *United States v. Real Estate Boards*, 339 U.S. 485 (1950); *Helvering v. Mitchell*, 303 U.S. 391 (1983).

The Sixth and Eighth Circuits distinguished the cases cited above on the ground that there were not particularized findings of fact in those cases. As the Eighth Circuit noted in this case, the Court felt that it could determine what the prior court would have done if the burden of proof had been the same as it is in this case. That holding misconstrues the principles which underlie this Court's prior decisions on this issue.

In *United States v. One Assortment of 89 Firearms*, 465 U.S. 360 (1984), the intervenor, Mulcahy, was acquitted in a criminal case of a charge of dealing in firearms without a license. His defense was entrapment. The Government then sought forfeiture of the firearms. This Court rejected Mulcahy's claim of collateral estoppel:

> We need not be concerned whether the jury decided to acquit Mulcahy because he was entrapped into making an illegal sale or whether the jurors were not convinced of his guilt beyond a reasonable doubt for other reasons. **In either case, the jury verdict in the criminal action did not negate the possibility that a preponderance of the evidence could show that Mulcahy was engaged in an unlicensed firearms business.** Mulcahy's acquittal on charges brought under §922(a)(i) therefore does not estop the Government from proving in civil proceedings that the firearms should be forfeited pursuant to §924(d). It is clear that the difference in the relative burdens of proof in the criminal and civil actions precludes the application of the doctrine of collateral estoppel.

Id. at 361-62. (emphasis added)

The crux of the Court's decision is that it is unfair to apply estoppel because the plaintiff, under a lesser burden of proof, might be able to prove what he could not prove under the higher burden. That reasoning holds true regardless of whether specific factual findings

are made in the first action.

The flaw in the reasoning of the Fifth and Eighth Circuits is easily demonstrated. The fundamental assumption which both courts made is that the decision would be the same regardless of the burden of proof. What if a trial court made specific factual findings under a clear and convincing standard when it should have applied a preponderance standard? Would the error be reversible? Obviously, it would be, yet under the Eighth Circuit's holding it would not, because the burden of proof would have no effect on the factual findings.

Because of the conflict between the circuits and between the Eighth Circuit's holding in this case and prior holdings of this Court, the Court should accept this issue for decision. This issue will arise regularly in the future, and the lower courts should have this Court's guidance.

Respectfully submitted,

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Appendix

In the United States District Court
Western District of Arkansas
Fort Smith Division

CLIFT C. LANE et al.

Plaintiffs

vs.

WILLIAM B. SULLIVAN et al.

Defendants

Civil No. 88-2128

ORDER AND JUDGMENT

Now on this fifteenth day of June, 1989, comes on for consideration the above-styled case.

IT APPEARING to the court that judgment should be entered for the defendants on the basis of collateral estoppel, it is ORDERED that judgment be, and it is hereby, entered for the defendants, and the complaint is dismissed with prejudice.

Hon. MORRIS S. ARNOLD
United States District Judge

Filed June 16, 1989
Chris R. Johnson, Clerk

United States Court of Appeals
For the Eighth Circuit
No. 89-2037

Clift C. Lane, Individually, and as Trustee under the Clift C. Lane Revocable Trust, and Dorothy P. Lane, Individually, and as Trustee under the Dorothy P. Lane Revocable Trust, et al.,

Appellants,

v.

William B. Sullivan, Individually, and as a Partner in the Law Partnership of Arent, Fox, Kintner, Plotkin & Kahn, et al.,

Appellees.

Appeal from the United States District Court for the Western District of Arkansas.

Submitted: January 18, 1990

Filed: April 10, 1990

Before LAY, Chief Judge, FLOYD R. GIBSON, Senior Circuit Judge, and JOHN R. GIBSON, Circuit Judge.

FLOYD R. GIBSON, Senior Circuit Judge.

This case is one of several involving claims by Appellants Dorothy and Clift Lane (the "Lanes") against various parties for alleged wrongdoing in the bankruptcy and sale of their poultry companies. Here the Lanes are suing their lawyer, William Sullivan, and his law firm, Arent, Fox of Washington, D. C. (collectively "Sullivan") for legal malpractice.

The Lanes appeal the grant of summary judgment to Sullivan entered by the district court[1] on the basis of collateral estoppel. The Lanes argue that the easier burden of proof (preponderance) to which they were subject in this suit forecloses the possibility of the preclusive effect of the prior judgment against them where they were subject to a higher burden of proof (clear and convincing). We disagree and affirm the district court on the basis of particular specific findings made in the earlier suit.

I. Background

Although we must review the facts in this case in the light most favorable to the Lanes because the case has come to us after a grant of summary judgment, the facts are already well laid out in several opinions, and we will not again recite them.[2] The short of the Lanes' trials for purposes of this case is as follows. After creating a successful poultry business over the course of several decades, things went sour and the Lanes filed for bankruptcy in 1982. They were represented in the bankruptcies by Sullivan. A Special Panel was appointed during the bankruptcy to run their companies in the event of certain defaults. The Special Panel stepped in sooner than called for by the terms of the bankruptcy plan o.i

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1. The Honorable Morris S. Arnold, United States District Judge for the Western District of Arkansas.

2. For greater factual detail see Lane v. Peterson, No. 89-2216, slip op. (8th Cir. March 30, 1990) and Lane v. Peterson, 851 F.2d 193 (8th Cir. 1988).

the condition that the Lanes sign over all their interest in stock of the Lane companies to the panel—in return the Lanes were to receive consulting fees. The Lanes signed over their interests, and the Special Panel began running the poultry businesses. An opportunity to sell the companies to a larger poultry concern presented itself, and the Special Panel did just that. As part of their complaints in both this and the earlier case, the Lanes allege that the Special Panel and Sullivan colluded to facilitate the sale of the Lane Companies before the Lanes actually transferred their holdings to the Special Panel.

The Lanes also complain that they did not understand the nature of the documents they signed when they transferred their stock to the Special Panel and were, in essence, cheated out of the profits from the sale of their companies. They sued the Special Panel members in federal district court in 1986 for breach of fiduciary duties under Arkansas law and requested the court to impose a constructive trust. The facts alleged in that complaint centered around the early transfer of control of the Lane Companies to the Special Panel, the transfer from the Lanes to the panel of the stock interests, and the sale of the companies. The district court[3] denied any relief, and a panel of this court affirmed in *Lane v. Peterson*, 851 F.2d 193 (8th Cir. 1988) (hereinafter "Lane I").

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3. The Honorable Oren Harris, Senior United States District Judge for the Western District of Arkansas.

In this suit, the Lanes charged Sullivan and his law firm with legal malpractice based on the same facts alleged in their suit against the Special Panel. Because the facts were the same as in the earlier case, Sullivan filed a motion to deem facts admitted. The district court treated this as a motion for summary judgment on the basis of collateral estoppel.

Judge Arnold found that Judge Harris' specific finding made in the first case, that the Lanes understood the transfer documents, was a finding necessary to that judgment and one that the Lanes had already had a chance to fully and fairly litigate. Thus, Judge Arnold held that the Lanes were precluded from relitigating that issue. He rejected the Lanes' suggestion that preclusion could not obtain because of the different burdens of proof between *Lane I* and this case because the specific findings on the Lanes' understanding of the transfer documents was not affected by that changed burden. Judge Arnold concluded that the findings reached by Judge Harris in the first case were conclusively reached on the question of the Lanes' understanding. Consequently, Judge Arnold granted summary judgment to Sullivan and dismissed the Lanes' complaint with prejudice.

II. Discussion

The precise issue on this appeal is whether the findings made by Judge Harris in *Lane I* with respect to the Lanes' understanding of the transfer of their stock holdings to the Special Panel preclude a finding that Sullivan committed malpractice in his representation of

the Lanes, despite the lesser burden of proof in this case. Put more simply, the issue is whether the Lanes are collaterally estopped from pursuing their malpractice claim by the findings from *Lane I*.

The threshold question for us, which was not addressed by the parties or the district court, is one of choice of law. Does federal or Arkansas law control the application of collateral estoppel in this case? The judgment from Judge Harris which is sought to be given preclusive effect was made by a federal district court sitting in diversity on claims under Arkansas law. Likewise, the district court below had jurisdiction of claims under Arkansas law by reason of diversity. Thus, should collateral estoppel apply, one federal court would be giving preclusive effect to the judgment of another federal court. That scenario seems to compel the conclusion that federal law should control. *Hauser v. Krupp Steel Producers, Inc.*, 761 F.2d 204, 207 (5th Cir. 1985) ("federal law governs the collateral estoppel effect of an earlier federal judgment, even in diversity cases.") (citation omitted).

However, cases from our court have consistently concluded that collateral estoppel in a diversity action is a question of substantive law controlled by state common law. In some of those cases the first judgment was from a state court or agency. *Richardson v. Phillips Petroleum Co.*, 791 F.2d 641 (8th Cir. 1986) (prior judgment was proceeding before Arkansas Oil and Gas Commission and was not given preclusive effect), *cert. denied*, 479 U.S. 1055 (1987); *Saporta v. Stephenson*, 751 F.2d 312 (8th Cir. 1985) (per curiam) (Nebraska state

court judgment on doctor's negligence given preclusive effect); *Kuehn v. Garcia*, 608 F.2d 1143 (8th Cir. 1979) (North Dakota Supreme Court disciplinary proceeding against attorney not given preclusive effect due to lack of mutuality required by recent North Dakota precedent), *cert. denied*, 445 U.S. 943 (1980). Nevertheless, we do not believe that we can depart from this conclusion in this case simply because the first judgment here came from a diversity case in federal court rather than from a true Arkansas state court. Just as the law of Arkansas governs in its state courts, it governed in the cases before Judges Harris and Arnold sitting in diversity, and so it governs us in the application of collateral estoppel in this case. *See Iowa Electric Light and Power Company v. Mobile Aerial Towers*, 723 F.2d 50, 52 (8th Cir. 1983) (affirming use of collateral estoppel based on diversity judgment and declaring state common law controlling without discussion).

Having determined that Arkansas law applies does not, unfortunately, get us much farther into our inquiry. There is a dearth of Arkansas case law on the use of collateral estoppel, and none whatsoever on the question of its use when burdens change from one suit to the next, as in this case. Arkansas law does characterize the elements of collateral estoppel in familiar language:

> 1) the issue sought to be precluded must be the same as that involved in the prior litigation; 2) that issue must have been actually litigated; 3) it must have been determined by a valid and final judgment; and 4) the determination must have been essential to the judgment.

East Texas Motor Freight Line v. Freeman, 289 Ark. 539, —, 713 S.W.2d 456, 459 (1986) (citations omitted).

But that is little more than hornbook law, and it does not help answer the question of what the Arkansas courts would do with differing burdens of proof.

When faced with deciding what state law is without the benefit of precedent to guide us, "we [will] apply what we view as the optimal rule of collateral estoppel under the circumstances of th[e] case." *Gerrard v. Larsen*, 517 F.2d 1127, 1132 (8th Cir. 1975). We have done this before with respect to the Arkansas law of collateral estoppel. In *Davidson v. Lonoke Production Credit Assoc.*, 695 F.2d 1115 (8th Cir. 1982), we concluded that, despite the general rule of mutuality of estoppel applied in Arkansas law, mutuality would not be required by the Arkansas courts in all cases.[4] The Arkansas law of collateral estoppel outlined above clearly applies in this case. The issue in both the prior litigation before Judge Harris and in this case before Judge Arnold was whether or not the Lanes understood what they were doing when they transferred their stock holdings to the Special Panel. A finding that they did understand defeats both the first cause of action, based on fiduciary duty, and this one,

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4. For discussions of this case, see Note, Davidson v. Lonoke Production Credit Association: A Federal Court Explores Mutuality of Collateral Estoppel in Arkansas, 37 Ark. L. Rev. 486 (1983); Richardson Oil Co. v. Cook, 617 F.Supp. 669, 670-71 (W.D. Ark. 1985).

based on legal malpractice.[5] The identity of issues is present. Whether the issue of understanding was actually litigated, determined in a final and valid judgment, and essential to that judgment are the remaining considerations. In *Lane I* the issue of understanding was litigated and essential to the final and valid judgment by Judge Harris. *See* Memorandum Opinion at 26, Appellants' Appendix at 72.

The fact that Sullivan was not a party to the first suit does not defeat collateral estoppel. Mutuality is not required so long as the Lanes had an incentive and a full and fair opportunity to litigate the issue of understanding before Judge Harris. *See Davidson*, 695 F.2d at 1120-21. We agree with Judge Arnold that they did. The issue of their understanding was something the Lanes tried and failed to disprove in their breach of fiduciary duty claim. In its simplest form, collateral estoppel precludes the Lanes in this case.

The interesting wrinkle, as we have already revealed, is whether collateral estoppel will apply even

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5. The Lanes' complaint against Sullivan reads much like their complaint from Lane I against the Special Panel, only here their theory of recovery is legal malpractice, and is something of a shotgun approach. They allege sixteen counts of negligence. The gist of each is that Sullivan either failed to represent or misrepresented to the Lanes the true nature of the transfer of their stock to the Special Panel. Complaint at 17-18, Appellants' Appendix at 19-20. A finding that the Lanes understood the transfer would defeat the causation element of negligence, thereby defeating the malpractice claim. The Lanes' attorney conceded as much in the pretrial conference before Judge Arnold. Transcript of Pretrial Conference at 4, Appellees' Appendix at 4.

though the burden of proof was significantly higher in the first suit for the party facing preclusion in the second suit. In *Lane I*, the Lanes had to prove breach of fiduciary duty by clear and convincing evidence. Judge Harris found, *inter alia*, that they could not do so because they understood the documents of transfer of their stock holdings. In this case, the Lanes' burden of proof to show legal malpractice by Sullivan is only by preponderance. If they again are found to have understood the documents of transfer, then there was no malpractice by Sullivan. The Lanes argue that because they were found to have understood the transfer documents where their burden to show otherwise was by clear and convincing evidence they are not necessarily prevented from showing otherwise by a preponderance in this case. Therefore, they conclude collateral estoppel should not preclude litigation of Sullivan's negligence, even though the question of their understanding of the transfer documents will necessarily be relitigated.

This argument is supported by the Restatement (Second) where it sets out exceptions to the operation of collateral estoppel at §28:

> Although an issue is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, relitigation of the issue in a subsequent action between the parties is not precluded in the following circumstances:
>
> . . .
>
> (4) The party against whom preclusion is sought had a significantly heavier burden of

> persuasion with respect to the issue in the initial action than in the subsequent action. . . .

Restatement (Second) of Judgments §28 (1980).

However, further comment in the Restatement reveals that there is room for exception to the black letter law outlined above, although such exceptions are not suggested.

> To apply issue preclusion in the cases described in Subsection (4) would be to hold, in effect, that the losing party in the first action would also have lost had a significantly different burden been imposed. **While there may be many occasions when such a holding would be correct,** there are many others in which the allocation and weight of the burden of persuasion (or burden of proof, as it is called in many jurisdictions) are critical in determining who should prevail. Since the process by which the issue was adjudicated cannot be reconstructed on the basis of a new and different burden, preclusive effect is properly denied. This is a major reason for the general rule that, even when the parties are the same, an acquittal in a criminal proceeding is not conclusive in a subsequent civil action arising out of the same event.

Id. at comment f (emphasis added) (citation omitted).

The last sentence from comment f describes the fact pattern in which collateral estoppel is most often not applied. In such cases a criminal defendant who has

been acquitted seeks to collaterally estop the government from maintaining some civil (usually a forfeiture) proceeding against him on the basis of his acquittal in the criminal action. The reason that collateral estoppel does not apply in such instances is that the government's burden has fallen off to only a preponderance in the civil proceeding from the much higher burden of beyond a reasonable doubt to which it was subject in the criminal proceeding. The government might very well be able to prove something by a preponderance that it could not prove beyond a reasonable doubt.[6]

Coming back to this case, we recognize that the Lanes also had a significantly higher burden in their first action than in this action. We also recognize the Lanes' reliance on *U.S. Aluminum Corp./Texas v. Alumax, Inc.*, 831 F.2d 878 (9th Cir. 1987), *cert. denied*, 109 S.Ct. 68 (1988), to bolster their position. While that case is on point as one denying the use of collateral estoppel where the evidentiary burden fell from clear and convincing in the first action to preponderance in the second, it did not discuss the particularity, *vel non*, of the first judgment and whether specific findings therein might have allowed for the later use of collateral estoppel. We do not view *U.S. Aluminum* as dispositive of the case before us, in which we are convinced that collateral estoppel should be used.

The facts of this case bring it within the possi-

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6. See, e.g., One Lot Emerald Cut Stone v. United States, 409 U.S. 232, 235 (1972) (per curiam).

ble exception of comment f and make it distinct from the cases cited by counsel and discovered in our research where collateral estoppel was not applied. All of those cases lacked the specificity found in the memorandum opinion of Judge Harris in *Lane I* upon which preclusion of an issue could be based.

The Lanes have made a valiant argument that Judge Harris' findings do not really mean that they understood what they were doing when those findings are viewed through the glass of clear and convincing evidence under *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). The Lanes' position is that when Judge Harris found that they fully understood the documents they signed that was only a finding that they failed to prove by clear and convincing evidence that they did not understand the documents. Because *Anderson* requires that findings must be made in light of the relevant evidentiary burden, the Lanes argue that Judge Harris' findings must leave room for them to prove by a preponderance in this case that they did **not** understand the documents.

We believe the Lanes have missed the simplicity of the findings from *Lane I*—obscuring them with an unnecessarily complex argument. While *Anderson* requires that a trial judge's findings be made and reviewed in light of the applicable evidentiary burden, *Anderson* does not preclude a trial judge from making findings that are more definitive than those couched only in terms of the applicable evidentiary standard. Judge Harris found that the Lanes fully understood the transfer documents. That is not the same as finding that they did not prove by clear and convincing evidence that they did not under-

stand the documents. While the latter would have been all that was necessary to defeat the Lanes under the clear and convincing burden, it was simply not what Judge Harris found. He concluded that the evidence went beyond a showing that the Lanes had failed to disprove their understanding by clear and convincing evidence, and instead showed that they actually had understanding by at least a preponderance, if not more. *See* Memorandum Opinion at 16, Appellants' Appendix at 62.[7] We affirmed in *Lane I.*

The Lanes further argue that Judge Harris was simply stating his findings in the affirmative and, therefore, was not doing anything more than they suggest. We disagree. Even a cursory reading of Judge Harris' opinion reveals that he found that the Lanes did understand the transfer—almost by clear and convincing evidence going the other way, as if the burden were on the Special Panel. We agree with Judge Arnold that it would be difficult to find more forthright findings than those reached by Judge Harris in the trial of *Lane I* on the question of the Lanes' understanding. Transcript of Pretrial Conference at 8, 12, 13, 17-18; Appellees' Appendix at 8, 12, 13, 17-18.

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7. By way of example, we quote a passage from Judge Harris' findings, "From the testimony, the Court finds that the Lanes clearly and completely understood the nature and the substance of each item which they signed. . . . " Memorandum Opinion at 16, Appellants' Appendix at 62. This finding is the kind which comment f describes. The finding suggests "in effect, that the losing party in the first action [the Lanes] would also have lost had a significantly different burden been imposed." Restatement (Second) of Judgments §28, comment f (1980).

Our decision to apply collateral estoppel in this case should be viewed in light of several considerations that do not suggest a broad rule of law. First, we are applying collateral estoppel in a civil case based on the judgment from an earlier civil case where the standard of proof has only fallen to preponderance from clear and convincing. Second, we are doing so on this record, by which we are convinced that the Lanes have had the opportunity to litigate this issue and lost on the merits by particular specific findings. Third, those findings can now be used to preclude relitigation under an easier burden only because of their particularity and specificity as discussed above.[8]

III. Conclusion

We hold that, because Judge Harris' findings were specific and certain on the question of the Lanes' understanding of the transfer documents, the Lanes are collaterally estopped from relitigating the same issue in this case. A finding that they understood the documents defeats the malpractice claim. That finding has already been made by Judge Harris, and we give it preclusive effect. Therefore, the summary judgment entered by the district court is affirmed.

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8. Our holding is not entirely without precedent. At least one other circuit has allowed collateral estoppel to operate despite a lesser burden of proof in the second action where specific findings have been made in the first action on an issue determinative of both. Marlene Industries Corp. v. N.L.R.B., 712 F.2d 1011, 1015-17 (6th Cir. 1983).

A true copy.
Attest:
Clerk. U.S. Court of Appeals, Eighth Circuit.

United States Court of Appeals
For the Eighth Circuit
No. 89-2037WA

Clift C. Lane, Individually, and as Trustee under the Clift C. Lane Revocable Trust, and Dorothy P. Lane, Individually, and as Trustee under the Dorothy P. Lane Revocable Trust, et al.,

Appellants,

v.

William B. Sullivan, Individually, and as a Partner in the Law Partnership of Arent, Fox, Kintner, Plotkin & Kahn, et al.,

Appellees.

Appeal from the United States District Court for the Western District of Arkansas.

Judgment

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is ordered and adjudged that the judgment of the district court is affirmed in accordance with the opinion of this Court.

April 10, 1990

A true copy.

Attest.

Robert D. St. Vrain
Clerk, U.S. Court of Appeals, Eighth Circuit
Mandate Issued: 5/1/90

No. 90-42

In The

Supreme Court of the United States

October Term, 1990

CLIFT C. LANE, INDIVIDUALLY, AND AS TRUSTEE UNDER THE CLIFT C. LANE REVOCABLE TRUST AND AS TRUSTEE UNDER THE DOROTHY P. LANE TRUST AND DOROTHY P. LANE, INDIVIDUALLY, AND AS TRUSTEE UNDER THE DOROTHY P. LANE REVOCABLE TRUST AND AS TRUSTEE UNDER THE CLIFT C. LANE TRUST,

Petitioners,

v.

WILLIAM B. SULLIVAN, INDIVIDUALLY, AND AS PARTNER OF THE LAW PARTNERSHIP OF ARENT, FOX, KINTNER, PLOTKIN AND KAHN,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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RESPONDENTS' STATEMENT OF QUESTION PRESENTED

Whether under the *Arkansas* law of collateral estoppel a particular, specific finding of fact by the trial judge in a prior civil action may bar the same plaintiffs from relitigating that fact in a subsequent civil action that imposes a lesser burden of proof.

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STATEMENT OF THE CASE

Although the Lanes' Statement of the Case contains several factual errors, they are not critical for purposes of this Court's resolution of the Petition for Writ of Certiorari. The reason is that the Lanes' case below was dismissed on the basis of collateral estoppel, which does not turn on the Lanes' misstatements of fact.

In this action, the Lanes claim that the respondent attorneys committed legal malpractice in connection with a stock transfer agreement executed on July 22, 1985. That transaction was the subject of prior litigation brought by the Lanes in the United States District Court for the Western District of Arkansas. *Lane v. Peterson*, No. 86-4069, *slip. op.* (W.D. Ark. July 2, 1987) ("Lane I"). After a five-day trial at which respondent William Sullivan and others testified, the trial judge found that the Lanes fully understood the nature and scope of the transaction at issue and that Sullivan had explained each document to the Lanes during the closing.[1] That determination was affirmed on appeal to the Eighth Circuit. *Lane v. Peterson*, 851 F.2d 193 (8th Cir. 1988). The Lanes' subsequent efforts to reopen the matter were denied, first, by the trial judge, and on appeal, by the Eighth Circuit. Still later, this Court denied certiorari. *Lane v. Peterson*, 110 S. Ct. 541 (1989).

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[1] The courts below quoted the following excerpt from the trial judge's factual findings in *Lane I*. "From the testimony, the Court finds that the Lanes clearly and completely understood the nature and the substance of each item which they signed. . . . " *Lane v. Sullivan*, 900 F.2d 1247, 1252 n.7 (8th Cir. 1990) (Pet. App. 14). *See also* 900 F.2d at 1253 (Pet. App. 14).

While the decision in *Lane I* was being appealed, the Lanes instituted this diversity action against respondent William B. Sullivan and his Washington, D.C., law firm, Arent, Fox, Kintner, Plotkin and Kahn. After considering the lesser burden of proof and the particular, specific fact finding in the earlier case that the Lanes fully understood the nature of the stock transfer, the trial court ruled that the Lanes' malpractice claim was barred by collateral estoppel. Although the Lanes disagreed with the trial court's application of collateral estoppel, they did concede that if they could not relitigate the fact of their understanding of the transaction, then their malpractice claim would necessarily fail due to lack of causation.

On appeal, the Eighth Circuit noted that Arkansas law would apply to this diversity case. *Lane v. Sullivan*, 900 F.2d 1247, 1250 (8th Cir. 1990) (Pet. App. 7). However, the Arkansas courts have apparently never addressed the narrow issue *sub judice*. The Court of Appeals therefore attempted to predict "what the Arkansas courts would do with differing burdens of proof." *Id.* (Pet. App. 8). In this connection the Court found it significant that the trial judge in *Lane I* concluded that "the evidence went beyond a showing that the Lanes had failed to disprove their understanding by clear and convincing evidence, and instead showed that they actually had understanding by at least a preponderance, if not more." (Pet App. 114) The Court of Appeals agreed with the District Court that "it would be difficult to find more forthright findings than those reached by Judge Harris in the trial of *Lane I* on the question of the Lanes' understanding." *Id.* at 1253 (Pet. App. 14). Relying in part on the *Restatement (Second) of Judgments* § 28, comment f (1980), the Eighth Circuit held

that, due to the specificity and particularity of the factual findings in *Lane I*, the Lanes should be collaterally estopped from relitigating the same issue, notwithstanding a change in the standard of proof. It therefore affirmed. The Lanes then filed their Petition with this Court.

REASONS FOR DENYING CERTIORARI

The Lanes portray this diversity case as one involving a split among the circuit courts of appeals. The Lanes suggest further that the Eighth Circuit's decision conflicts with prior holdings of this Court and thereby undermines the uniformity of the law as applied by the federal courts. Finally, the Lanes contend that the issue involved in this case is of recurring significance. The Lanes are wrong on all accounts.

No Split Exists Among the Circuits

The Lanes fail to mention that the Eighth Circuit was forecasting *Arkansas* law, not creating any *federal* rule on collateral estoppel. As the Eighth Circuit properly noted, the question presented was "what the Arkansas courts would do with differing burdens of proof," *Lane v. Sullivan*, 900 F.2d at 1250 (8th Cir. 1990) (Pet. App. 8), where the prior action yielded specific and detailed findings of fact. Apparently no other court, federal or state, has ever construed the Arkansas law of collateral estoppel in this context. Certainly the cases cited by petitioners do not. Consequently there is no "split" of authority. Moreover, even if this Court were to believe that the Eighth Circuit

incorrectly predicted how the Arkansas courts would handle the issue, the situation would be best left to the Arkansas courts to address in a future case.

The Lanes' split-among-the-circuits argument suffers from another fatal defect. The appellate decision that the Lanes claim is in their favor, *U.S. Aluminum Corp/Texas v. Alumax, Inc.*, 831 F.2d 878 (9th Cir. 1987), *cert. denied*, 109 S. Ct. 68 (1988), never actually addressed the narrow issue presented herein: whether a specific, particular finding of fact rendered in a prior civil decision could provide a basis for collateral estoppel, notwithstanding any lessened burden of proof. As the Eighth Circuit correctly pointed out, *U.S. Aluminum*

> did not discuss the particularity, *vel non*, of the first judgment and whether specific findings therein might have allowed for the later use of collateral estoppel. We do not view *U.S. Aluminum* as dispositive of the case before us, in which we are convinced that collateral estoppel should be used.

900 F.2d at 1252 (Pet. App. 12).

Prior Supreme Court Decisions Have Not Addressed the Issue Presented Here

The Lanes' reliance on prior Supreme Court decisions, *e.g.*, *United States v. One Assortment of 89 Firearms*, 465 U.S. 354 (1984), is misplaced. Those cases simply do not address whether collateral estoppel can prevent relitigation of a particular, specific finding of fact when there is a lesser burden of proof in the subsequent proceeding, let alone how the Arkansas courts would decide

that narrow issue.[2] Since this Court has never dealt with the issue, there can be no inconsistency with the decision below.

The Issue Is Unlikely to Arise Frequently

The Lanes also contend that the issue presented herein "will arise regularly in the future." (Pet. 8). This is highly improbable since no Arkansas court (or federal court applying Arkansas law) has ever addressed the issue in the past. Yet even casting aside the fact that this case deals strictly with previously uncharted Arkansas law, the issue presented herein is so narrow that apparently only one other reported case, *Marlene Industries Corp. v. NLRB*, 712 F.2d 1011 (6th Cir. 1983) (applying federal law on collateral estoppel), has ever actually addressed it. As in the decision below, *Marlene* found that, given the particularized and affirmative nature of the prior factual findings, collateral estoppel should be applied in a subsequent proceeding notwithstanding any change in the burden of proof. *Id.* at 1016-17.

Finally, the Eighth Circuit took pains to point out that its decision was based on a uniquely particularized record and not meant to "suggest a broad rule of law." 900 F.2d at 1253 (Pet. App. 15). Thus, although dispositive as between the parties herein, the ruling is by its own

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[2] In fact, in *One Assortment*, the jury in the prior action made no specific findings of fact upon which collateral estoppel could be based. *See United States v. One Assortment of 89 Firearms*, 685 F.2d 913, 919 (4th Cir.) (Winter, J., dissenting) ("in returning a verdict of not guilty, the jury did not specify the grounds of acquittal. . . . "), *rev'd*, 465 U.S. 354 (1984).

terms limited in scope and likely to have minimal impact on subsequent litigation.

CONCLUSION

The petition should be denied. The decision below is well-reasoned and just. Yet even more fundamentally, the question in this diversity case turns on an interpretation of the *Arkansas* law of collateral estoppel that no other court – state or federal – has ever addressed. Indeed, the only analogous case (*Marlene*), which applied federal law on collateral estoppel, reached the same conclusion as did the Eighth Circuit below. Unless and until the issue is developed further by the lower courts and a conflict develops, consideration by this Court would be premature.

Respectfully submitted,

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